Filed 6/19/19 Cooley v. W. Lakeside Homes, LLC CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID COOLEY, Plaintiff and Respondent, v. W. LAKESIDE HOMES, LLC, et al., Defendants and Appellants.	B284891 Los Angeles County Super. Ct. No. BC642893

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Robinson Legal and Raymond G. Robinson for Defendants and Appellants.

CSReeder, Christopher S. Reeder and Elan Bloch for Plaintiff and Respondent.

INTRODUCTION

Defendants W. Lakeside Homes, LLC, Barrett Wissman, and Nina Wissman appeal from a default judgment entered against them in an unlawful detainer action. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *Unlawful detainer complaint and motion to quash*

In March 2016, W. Lakeside Homes, LLC, through its managing member, Barrett Wissman, signed a lease agreement with David Cooley to rent his Hancock Park home (property) from April 1, 2016 through March 31, 2018 for $25,000 per month.[1] Lakeside was the named tenant under the lease, but Barrett,[2] his wife Nina Kotova Wissman, and their child lived there. On November 11, 2016, Cooley served a three-day notice to quit under Code of Civil Procedure[3] section 1161, terminating the lease on the ground that someone living at the property had battered a woman providing maid services under the lease.[4] Cooley returned Lakeside's November rent payment, but Barrett and his family did not vacate the property. Cooley then filed an

---

[1] The initial lease term was from April 1, 2016 through September 30, 2016, subject to three automatic extensions of six months each at Lakeside's option.

[2] We refer to the Wissmans by their first names for readability and to avoid confusion. We intend no disrespect.

[3] All further statutory references are to the Code of Civil Procedure.

[4] Cooley provided maid service twice a week as part of the rent. Cooley left Barrett a phone message in November 2016 saying Nina had "beaten up the maid." The Wissmans denied the accusation.

unlawful detainer action against Lakeside, Barrett, and doe defendants on December 5, 2016, and had a registered process server serve the summons and the complaint.

On December 13, 2016, Lakeside and Barrett filed a motion to quash service of the summons and unlawful detainer complaint. The trial court heard defendants' motion on December 30, 2016, and granted it, directing Cooley to re-serve defendants.

2. *Second motion to quash*

Cooley had the summons and complaint re-served on January 4, 2017. The process server left four copies of the summons and complaint on the hood of Barrett's car after Barrett drove up to the property and into the driveway; he would not get out of the car. The process server "advised [Barrett] he was being served individually, on behalf of W. Lakeside Homes LLC, and sub-served for Jane Doe (Nina Kotova) and for all other occupants." The summonses identified Lakeside, Barrett, and Does 1-10 as the defendants. One summons notified the person served as being served as "an individual defendant," "as the person sued under the fictitious name of . . . W. Lakeside Homes, LLC," and "as an occupant." The second summons was identical. The third summons was the same, but added service "on behalf of . . . W. Lakeside Homes, LLC," under section 416.10. The fourth summons notified the person served as being served as an individual defendant and occupant, and "as the person sued under the fictitious name of [typed] . . . Doe 1 (Nina Kotova) [handwritten]."

Lakeside, Barrett, and Nina filed a second motion to quash service of summons and complaint on January 9, 2017.

They argued the service was ineffective on various grounds,[5] including that Cooley had to amend the complaint to substitute Nina as a doe defendant and have the clerk of the court reissue an amended summons before serving her. Nina and Barrett also declared they never received a copy of the summons and complaint in the mail after the papers were left on Barrett's hood.

Cooley opposed the motion and submitted proofs of service signed under penalty of perjury by a registered process server. They show that on January 4, 2017, Barrett was personally served; Lakeside Homes, LLC, was personally served by serving Barrett as its agent; Doe 1 (Nina Kotova) was served through substituted service by leaving the papers with a member of the household (Barrett) and mailing a copy to her at the property address; and all occupants similarly were served through substituted service. The process server's declaration of diligence included the six earlier attempts to serve the summons and complaint in December 2016 that were the subject of the first motion to quash and the January 4, 2017 service. Cooley also submitted the doe amendment to the complaint naming Nina, filed the day after the motion to quash on January 10, 2017.

The trial court heard defendants' motion on January 17, 2017. The court heard argument, but took the matter under submission because it did not have a copy of the earlier filed moving or opposing papers. On January 19, 2017, the court denied defendants' motion. The court mailed a copy of the January 19, 2017 file-stamped order to the parties' attorneys.

---

[5] On appeal, defendants challenge the service as to Nina only.

3. *Discovery and filing of petition for writ of mandate*

Lakeside propounded discovery to Cooley, served by overnight delivery on January 24, 2017. Cooley in turn personally served discovery propounded to defendants on February 1, 2017. On February 1, 2017, Cooley's counsel also asked defendants' counsel about the status of their responsive pleading to the unlawful detainer complaint, noting the deadline to file one was January 30, 2017. He warned he intended to file a request for entry of default. Defendants' counsel, through his paralegal, disagreed. He said defendants had until February 3, 2017, to file a response and advised they intended to file a petition for writ of mandate.

On February 3, 2017, defendants filed a petition for writ of mandate from the court's order denying their motion to quash. That same day, defendants filed a "Notice of Stay of Proceedings" in the trial court. The notice checked the box for "[a]utomatic stay caused by a filing in another court" and cited sections 418.10, subdivision (c) and 586, subdivision (a)(4). The notice did not attach the petition for writ of mandate or identify the court of appeal case number.

4. *Requests for default*

Cooley filed a request for entry of default on February 6, 2017. The clerk rejected it on February 9, 2017, based on the notice of stay. Cooley had filed an objection to the notice of stay on February 7, 2017. He argued section 418.10, subdivision (c) did not authorize an automatic stay of the proceedings, defendants never asked the trial court to issue a stay, they never received a stay from the Court of Appeal, and their petition for writ of mandate was untimely.

On February 10, 2017, Cooley's counsel wrote to defendants' counsel to ask about their pending discovery responses and deposition appearances. Defendants' counsel responded that the case was stayed, including discovery.

Cooley filed a second request for entry of default on February 14, 2017; the clerk again rejected it on February 23, 2017. Cooley moved ex parte on February 16, 2017, for an order directing the clerk to enter his request for entry of default, or alternatively, for a hearing on his motion for terminating sanctions, other sanctions, and to deem his requests for admissions admitted based on defendants' failure to respond to discovery. The court granted Cooley's application for a hearing and set a hearing on his motion for February 23, 2017.

Defendants' attorney did not appear at the February 16 or February 23, 2017 hearings because he "believe[d] the stay to be in effect."[6] Nor did defendants file an opposition to Cooley's application. The court granted the application. It struck the notice of stay, finding that "[b]ecause there are no corresponding notices of appeal filed in this action, the notice of stay of proceedings appears to be a sham filing." The court also found that because "[n]o answers or notices of appeal" had been filed, "[d]efendants' time to respond to the unlawful detainer complaint ha[d] run." The court entered defaults against each defendant, but did not issue any sanctions at "this time." Cooley then sought

---

[6] He also told the trial court at the March 10, 2017 hearing on defendants' first motion for relief from default that he missed one hearing due to a family emergency involving his hospitalized grandchild and the second because Cooley's attorney had set the hearing on a date defendants' attorney was out of the state on business.

entry of default judgment and a writ of possession by ex parte application on March 2, 2017, which was granted.[7]

On March 10, 2017, defendants filed an ex parte application to vacate and set aside the entry of defaults and default judgment and to recall the writ of possession. Defendants moved to set aside their defaults and default judgment under section 473, subdivision (d) on the ground the court lacked jurisdiction to enter the default and default judgment, rendering them void. Because they had filed a petition for writ of mandate —which still was pending—following the court's denial of their motion to quash and a notice of stay, defendants argued that no default could be entered against them under section 418.10, subdivision (d).

The trial court denied defendants' application for relief, but stayed the execution of the writ of possession until March 16, 2017, to allow defendants time to ask this court for a stay. On March 13, 2017, defendants filed an emergency petition for stay while their first writ was pending with a petition for writ of mandate to set aside the default and default judgment and recall the writ of possession.

On March 14, 2017, we dismissed defendants' February 3, 2017 petition for writ of mandate as untimely and denied the request for stay. We also denied their March 13, 2017 petition for writ of mandate and request for immediate stay.

On March 16, 2017, defendants filed a second ex parte application to vacate the default and default judgment and recall the writ of possession, but this time under section 473,

---

[7] Cooley filed the form application for a writ of possession the next day, March 3, 2017.

subdivision (b). Defendants' attorney filed a supporting declaration of fault with the application. In it he declared that he

> "believed that under [section] 418.10[, subdivisions] (c) and (d) a stay applied on all phases of this case[ ] as of February 3, 2017, including discovery, until ten days after the Court of Appeal returned the case to the trial court. Also, I did not file a demurrer to respond to the complaint, for that same reason. [¶] Consequently, believing the stay to be in effect I did not appear at Plaintiff's ex parte hearings regarding entry of default and entry of default judgment. [¶] . . . [¶] I apologize to the court that my misunderstanding of the stay caused this confusion. It should not be allowed to harm my clients."

The court denied the application and lifted the stay it had granted.[8]

The court ultimately entered judgment against defendants on June 27, 2017, in the amount of $111,559.20 in damages, $6,843.73 in costs, and $21,000 in legal fees. Cooley gave notice of entry of judgment on July 6, 2017. Defendants filed a timely notice of appeal.

---

[8] The court's March 16, 2017 minute order denying defendants' application is not part of the Clerk's Transcript. We take judicial notice of it on our own motion. No reporter was present at that hearing.

DISCUSSION

Defendants appeal from the entry of their defaults and the default judgment. They do not seek to be restored to possession of the property, however. They essentially contend the court abused its discretion when it denied their motion for relief from default under section 473, subdivision (d) on the grounds that (1) the default judgment is void as to all defendants because their defaults could not be taken under section 418.10, subdivision (d), while their petition for writ of mandate was pending in this court; and (2) the default judgment is void as to Nina because she was not properly served. Defendants also contend the trial court abused its discretion when it denied their second motion for relief from default based on attorney mistake under section 473, subdivision (b).

1. *Standard of review*

We review an order denying a motion to vacate a default and set aside a judgment under section 473 for an abuse of discretion. (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Ibid.*) We review de novo, however, a trial court's determination that a default judgment is or is not void. (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 752.) Nevertheless, "we will not disturb the trial court's factual findings where . . . they are based on substantial evidence. It is the province of the trial court to determine the credibility of the declarants and to weigh the evidence." (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828.) "Questions of law, including [the] application and interpretation of [a] statute" are subject to our

independent review. (*Kern County Dept. of Child Support Services v. Camacho* (2012) 209 Cal.App.4th 1028, 1035.)

"Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.' " (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980.)

2. *The court did not err when it denied defendants' motion for relief from default under section 473, subdivision (d)*

a. *The default judgment was not void under section 418.10, subdivision (d)*

Defendants contend the trial court was prohibited from entering their defaults once they filed their petition for writ of mandate and notice of stay of proceedings under section 418.10. Section 418.10 permits a defendant to file a motion to quash service of summons on or before the last day to file a responsive pleading. (§418.10, subd. (a)(1).) If the court denies the motion, a defendant has an additional 15 days to file a responsive pleading from service of a "written notice of entry of an order denying" the motion. (§ 418.10, subd. (b).) Alternatively, a defendant may petition the Court of Appeal for a writ of mandate to compel the trial court to enter an order "quashing the service of summons or staying or dismissing the action" if the defendant does so within 10 days of service of the notice of entry of the order denying the motion. (§ 418.10, subd. (c).) "No default may be entered against a defendant before expiration of his or her time to plead." (§ 418.10, subd. (d).)

Relying on these provisions, defendants argued below and continue to contend they had until February 3, 2017[9] to file their petition for writ of mandate under sections 418.10, subdivision (c) and 1013, subdivision (a). They seem to argue they had 15 days to file their petition—10 days from January 19, 2017, the date the court entered and mailed the order, under section 418.10, subdivision (c) and an extra five days for service by mail under section 1013, subdivision (a).

Defendants are wrong. In calculating the time to file their petition, defendants failed to consider section 1167.4. That section applies to motions to quash filed in summary proceedings, including unlawful detainer proceedings. (§ 1167.4 [section applies to summary proceedings for obtaining possession of real property "[n]otwithstanding any other provision of law"].)

Section 1167.4 provides that the filing of a motion to quash under section 418.10 extends a defendant's "time to plead until *five days* after service upon him of the written notice of entry of an order denying his motion." (§ 1167.4, subd. (b), italics added.) Thus, while section 418.10 gives a defendant an additional 15 days to plead or an additional 10 days to petition for writ of mandate after service of the notice denying its motion to quash, that timing structure is superseded by the shortened pleading schedule dictated by section 1167.4. (See Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2018) ¶ 8.177 [in unlawful detainer action writ petition following denial of motion to quash "must be filed on or before the last date

---

[9] Defendants brief states "February 13, 2017," but we assume they mean February 3, 2017, which is 10 days from January 24, 2017, and is the actual date they filed their petition.

defendant has to plead—i.e., within five days of service of notice of denial of the motion" and noting "§ 1167.4(b) *supersedes*" the 10-day " 'window period' " to file a writ petition after denial of a motion to quash in summary proceedings].)[10] Moreover, section 418.10, subdivision (c) states that a defendant must file his responsive pleading within the required time "unless, on or before the last day of the defendant's *time to plead*, he or she serves upon the adverse party and files with the trial court a notice that he or she has petitioned for a writ of mandate." (Italics added.)

Thus, under sections 1167.4, subdivision (b) and 418.10, subdivision (c), to extend their time to respond to the unlawful detainer complaint, defendants had to file their petition for writ of mandate and a notice that they had done so within *five* days, plus an extra five days for service by mail, from service of the order denying their motion to quash. Because the tenth day from January 19, 2017—the date the court mailed the order—fell on a Sunday, that date was January 30, 2017, not February 3, 2017.

Nevertheless, defendants argued below that the time to file their petition for writ of mandate had not begun to run because Cooley never served them with a notice of ruling that the order denying their motion to quash had been entered. Defendants' argument is not well-taken. Under both sections 418.10 and 1167.4, "a written notice of entry of an order" denying the

---

[10] Section 1177 provides that Code of Civil Procedure Part II (including section 418.10) applies to summary proceedings "*[e]xcept as otherwise provided*" by the chapter governing summary proceedings to obtain possession of real property, section 1159 et seq. (Italics added; see Friedman et al., Cal. Practice Guide: Landlord-Tenant, *supra*, ¶ 8:177.1.)

defendant's motion to quash triggers the defendant's time to plead or to file a petition for writ of mandate. Defendants' attorney admitted not only that he had received the court's order denying defendants' motion to quash, but that the court had mailed it on January 19, 2017, the day it was entered.

On January 17, 2017, the court heard argument on defendants' motion to quash and took the matter under submission. It did not order plaintiff to give notice of its ruling. Rather, the court mailed its January 19, 2017 file-stamped order denying defendants' motion to quash to the parties' attorneys. A certificate of mailing attached to the order lists the attorneys, the parties they represent, and their addresses. This is sufficient to constitute a written notice of entry of order to trigger the starting time for defendants to file their petition for writ of mandate. (Cf. *Eldridge v. Superior Court* (1989) 208 Cal.App.3d 1350, 1352-1353, 1355 [holding clerk's mailing of file-stamped copy of order denying motion for summary adjudication constituted service of "written notice of entry of the order" that began the limitations period within which party could petition for peremptory writ under section 437c, subdivision (*l*) rather than the later-served notice by counsel].)

Had defendants filed a timely petition for writ of mandate and notice that they had done so, they could have extended their time to respond to the complaint until "10 days after service upon him or her of a written notice of the final judgment in the mandate proceeding." (§ 418.10, subd. (c).) Because defendants' petition was untimely, however, the filing of it and the related notice of stay of proceedings did not extend defendants' time to file a responsive pleading to Cooley's unlawful detainer complaint.

Defendants seem to contend that even if the petition was untimely, the unlawful detainer proceedings were stayed while the petition was pending in this court. They argue, "the stay was effective immediately and automatically *once* the notice of stay was filed in the trial court." But section 418.10, subdivision (c) cannot be more plain—a "defendant *shall* file or enter his or her responsive pleading in the trial court within the time prescribed by subdivision (b) [as modified by section 1167.4, subdivision (b)] *unless, on or before the last day of the defendant's time to plead*, he or she serves upon the adverse party and files with the trial court *a notice that he or she has petitioned for a writ of mandate*." (Italics added.)

Defendants decidedly did not file their notice on or before the last day for them to plead—January 30, 2017. Moreover, defendants did not file a notice that they had *petitioned for a writ of mandate* as the statute requires. They filed a judicial council form notice of stay of proceedings, but did not attach a copy of the petition for writ of mandate, as the form requires, or state the petition had been filed, as the statute requires. If they had, the trial court may not have been confused about the fact that no "notices of appeal" had been filed and may not have found the notice of stay a sham pleading.

Accordingly, the court did not err when it denied defendants' motion for relief from the default and default judgment under section 473, subdivision (d), as the underlying judgment was not void and the proceedings were not "stayed"

while defendants' untimely petition for writ of mandate was pending.[11]

b. *The default judgment was not void as to Nina for improper service*

Defendants contend Cooley did not demonstrate Nina was served by substituted service because the process server did not exercise reasonable diligence to serve her personally first and did not mail the summons and complaint. They also argue Nina had to be served with an amended summons after she was substituted as a doe defendant.

" ' "[A] default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void." ' " (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200 (*Hearn*).) Here, the trial court found Nina was properly served by substituted service on January 4, 2017. Service of process provisions, including those for substituted

---

[11] We agree with defendants that section 418.10 applies to unlawful detainer actions and precludes entry of default against a defendant while the defendant's petition for writ of mandate is pending. But, that protection applies *only if* the defendant has filed a *timely* notice that the writ petition has been filed. That did not happen here. Defendants' reliance on *In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1 (*Obrecht*), which they mischaracterize as an unlawful detainer action, is thus misplaced. In that marital dissolution case, the court agreed section 418.10, subdivision (c) "held open" the defendant's time to plead and subdivision (d) "prohibited entry of a default during that time." (*Obrecht,* at p. 15.) But, there, the defendant's petition for writ of mandate was not untimely, and he had notified the trial court that he was filing a petition for writ of mandate. (*Ibid.*)

service, are "to be liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant." (*Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 Cal.App.4th 1387, 1392 (*Bein*).) "Thus, substantial compliance is sufficient." (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313 [considering service under section 416.10].)

Under section 415.20, subdivision (b), "If a copy of the summons and the complaint cannot with reasonable diligence be personally delivered to the person to be served . . . a summons may be served by leaving a copy of the summons and the complaint" at the person's home "in the presence of a . . . member of the household . . . at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint . . . to the person to be served at the place where a copy of the summons and the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing."

Defendants' first contention—that the summons and complaint were not mailed—is not well-taken. In the proof of service filed with the court on January 10, 2017, the registered process server swore under penalty of perjury that he left a copy of the summons, complaint, and other documents with Barrett and then mailed a copy of them to Nina at the property's address on January 4, 2017. This proof of service created a rebuttable presumption of proper service that the court concluded Nina did not overcome. (Evid. Code, § 647; *Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1427.) Substantial evidence supports the court's finding. As the court noted, the time between the date the documents purportedly were mailed and Nina's January 8, 2017 declaration that she never received

them was too short to prove the summons and complaint never were properly mailed. We also reasonably can infer the trial court credited the process server's declaration over Nina's; we must defer to its determinations of credibility. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

As for the process server's "reasonable diligence" in attempting personal service, defendants are correct that the declaration of diligence from the registered process server, signed under penalty of perjury, lists six attempts to serve the summons and complaint on Barrett and Lakeside in December 2016, not on Nina specifically. But, those service attempts also included attempts to serve Barrett on behalf of all other occupants residing at the property, which would include Nina, as Cooley notes.

Moreover, the property is gated and the process server declared no one answered the intercom on four occasions and no one answered the door on another occasion. And on the sixth occasion, the morning of December 9, a woman in a bathrobe turned and "ran into the home" before the process server could give her the summons and complaint, after another adult and child drove away from the property.[12]

---

[12] Defendants contend the judge who granted their first motion to quash found the process server's declaration of his service attempt on December 9, 2016, "false and insufficient." Cooley on the other hand describes that judge as ordering service to be "made again in an abundance of caution, due to the contradicting statements between [defendants] and the process server." There is no reporter's transcript of the hearing on defendants' first motion to quash. Suffice it to say, we reasonably can infer that the judge who heard defendants' second motion to quash considered the declaration of diligence from the process

Considering the several attempts to serve not only Barrett and Lakeside, but all other occupants of the property, that all defendants—including Nina—resided at the property, and the difficulties the process server had because defendants would not open the gate or would not accept the documents, additional attempts at personal service on Nina were not necessary to demonstrate she could not be personally served "with reasonable diligence." Leaving the summons and complaint with her husband[13] was "reasonably calculated" to provide Nina with actual notice of the action and thus substantially complied with the substituted service requirements of section 415.20, subdivision (b). (*Espindola v. Nunez* (1988) 199 Cal.App.3d 1389, 1391-1393 [upholding substituted service of husband where wife served and process server had visited home three times previously; additional attempts to serve husband individually were not required because "the actions of the process server were calculated to, and did, result in actual notice," satisfying the reasonable diligence requirement]; see also *Bein, supra,* 6 Cal.App.4th at p. 1392 [substituted service is sound if

---

server, the declarations of the Wissmans, and the argument of counsel and concluded defendants were attempting to evade service, having stated defendants' motion was "not well-received."

[13] The process server's leaving of the summons and complaint with Barrett—who was in his car in the driveway of the property—was effective under *Trujillo v. Trujillo* (1945) 71 Cal.App.2d 257, 259-260 (service of process valid where papers left on defendant's windshield after he refused to unlock door and rolled up window). Defendants do not contend that placing the documents on the hood of Barrett's car was ineffective service.

" ' "reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard" ' "].)[14]

Finally, we reject defendants' argument that the summons was defective because Nina's name was written on it after it was issued and served before Cooley filed a doe amendment. The summons served on Nina was an approved Judicial Council form, issued by the clerk of the court, directed to Lakeside, Barrett, and Does 1-10. It thus met the requirements of section 412.20. (§ 412.20, subd. (c) [summons form approved by Judicial Council "deemed to comply" with statute].)

Also, the "notice to the person served" section indicated Nina was being served under the fictitious name of "Doe 1 (Nina Kotova)," as an individual defendant, and as an occupant. That statement complied with the requirement under section 474 that no default may be taken against a doe defendant unless the summons served on the defendant states the defendant is being " 'sued under the fictitious name of (designating it).' " The summons thus put Nina on notice that she was being sued under a fictitious name and of the claims asserted against her. (Cf. *Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852,

---

[14] Defendants rely on *Bishop v. Silva* (1991) 234 Cal.App.3d 1317 to argue service of process must be strictly construed against the plaintiff. That case is inapposite. There, the court explained the policy of strictly construing a plaintiff's excuse that the plaintiff was unable to serve a defendant within the prescribed statutory period requires the plaintiff to exercise diligence. (*Id.* at pp. 1321-1322.) The court found no reasonable diligence there where the plaintiff lost the original summons and failed to investigate the matter sufficiently before the deadline to serve defendant expired. (*Id.* at p. 1322.)

856-859 [service ineffective and default judgment void where summons only checked the "individual defendant" box and did not also notify defendant he was being sued as the person named as Doe 1 in the pleadings].)

Moreover, Cooley filed a doe amendment to his complaint naming Nina on January 10, 2017. His process server left the summons package directed to her with Barrett before the amendment was filed, but, as Cooley notes, substituted service on Nina was effective after the amendment was filed, on January 14, 2017, 10 days after the summons and complaint were mailed. (§ 415.20, subd. (b).) And, nothing in section 474 requires a plaintiff to have the summons re-issued in the doe defendant's name.

We thus conclude the court did not err in finding Nina was properly served by substituted service on January 4, 2017. The default and default judgment therefore were not void for lack of proper service as to Nina.

3. *Defendants' motion for relief under the mandatory provision of section 473, subdivision (b) was defective*

Defendants' second motion for relief from default was based on section 473, subdivision (b).[15] That section " 'contains two

---

[15] We reject Cooley's argument that the second motion for relief from default was a motion for reconsideration of the court's order denying their first motion. The second motion was brought under a *different subdivision* of section 473 after this court dismissed defendants' petition for writ of mandate as untimely, and defendants' counsel learned of his mistake. It did not ask the court to reconsider its finding that the default judgment was not void. Nevertheless, the argument is forfeited because nothing in the record shows Cooley raised it below. (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1026.)

distinct provisions for relief from default.' " (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 438 (*Corsair*).) One gives the court discretion to relieve a party "from a judgment, dismissal, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b); *Corsair*, at p. 437; *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1007 [provision is "*purely discretionary*"].) The other is mandatory, requiring the court to vacate any default or default judgment when the application for relief is "accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect . . . unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b); *Corsair*, at p. 438.) The mandatory relief provision "is available for inexcusable neglect [citation], while discretionary relief is reserved for '*excusable* neglect.' " (*Corsair*, at p. 438.) If a court grants a party relief under the mandatory provision, it must "direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." (§ 473, subd. (b).)

"Whether section 473, subdivision (b)'s requirements have been satisfied in any given case is a question we review for substantial evidence where the evidence is disputed and de novo where it is undisputed." (*Corsair, supra*, 244 Cal.App.4th at p. 437.) "If the prerequisites for the application of the mandatory relief provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief." (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516.)

We do not know on what grounds the trial court denied defendants' motion—the minute order is silent and the hearing on defendants' motion for relief from default under section 473, subdivision (b) was not reported. A judgment or order challenged on appeal is presumed to be correct, and "it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior* Cour*t* (1970) 2 Cal.3d 557, 564.) In the absence of a reporter's transcript " '[w]e must . . . presume that what occurred at that hearing supports the judgment.' " (*Obrecht, supra,* 245 Cal.App.4th at p. 9; see also *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [presuming order denying motion for relief under section 473 "based on any rationale supported by the record" in the absence of a reporter's transcript].)

Defendants' points and authorities in support of their application for relief clearly reference the attorney fault provision of section 473, subdivision (b). They noted the court "must grant a motion to vacate any order that was entered as a result of the error by an attorney if that attorney files an affidavit of fault." Defendants did not as clearly state whether their attorney's mistake also entitled them to discretionary relief.

The notice of motion stated the motion was based on the grounds that "counsel for defendants erroneously believed that the filing of a Petition for Writ of Mandate in the Court of Appeal on February 3, 2017, and the corresponding filing of a Notice of Stay of Proceeding on the same date in this court, stayed all phases of litigation in this case, including in particular the duty

to file a demurrer or answer to the complaint, and the duty to respond to discovery." In their points and authorities, defendants seem to argue their attorney's error was a "surprise" under section 473, subdivision (b), suggesting they were moving under the discretionary component of the statute. Nevertheless, the remainder of defendants' argument was based entirely on their attorney's mistake and did not provide any basis for the court to find the attorney's error was not based on his own negligence in order to constitute a surprise under the discretionary provision of the statute.[16] The motion also attached defendants' attorney's declaration of fault. We therefore conclude the motion sought relief under the mandatory provision of section 473, subdivision (b) based on attorney fault.[17]

---

[16] In terms of the discretionary bases for relief under section 473, subdivision (b), defendants' moving papers only refer to "surprise," defining it as " 'some condition or situation in which a party . . . is unexpectedly placed to his injury, *without* any default or *negligence* of his own, which ordinary prudence could not have guarded against,' " citing to *Credit Managers Assn. v. National Independent Business Alliance* (1984) 162 Cal.App.3d 1166, 1173.

[17] To the extent defendants argue on appeal that the motion should have been granted under the discretionary provision of section 473, subdivision (b), the record does not support a finding that the court abused its discretion on that ground. Defendants did not show how they were surprised or that their attorney's error was more than " 'the result of professional incompetence, general ignorance of the law, or unjustifiable negligence in discovering the law.' " (*Hearn, supra*, 177 Cal.App.4th at p. 1206.) Moreover, absent a reporter's transcript of the hearing, we cannot conclude the court abused its discretion under section 473.

"[A] trial court is obligated to set aside a default, default judgment, or dismissal if the motion for mandatory relief (1) is filed within six months of the entry of judgment, (2) 'is in proper form,' (3) is accompanied by the attorney affidavit of fault, and (4) demonstrates that the default or dismissal was 'in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.' " (*Corsair, supra*, 244 Cal.App.4th at p. 443.) To be in the proper form, an application for relief under section 473, subdivision (b) must "be accompanied by a copy of the answer or other pleading proposed to be filed" in the action. (§ 473, subd. (b) ["application shall not be granted" unless "accompanied by" proposed pleading].)

Here, defendants' attorney declared he did not respond to the complaint or to discovery—the reason the defaults and default judgment were entered—because he "believed" a stay applied under section 418.10, subdivisions (c) and (d). He referred to this belief as "my misunderstanding," and asked the court that it "not be allowed to harm my clients." In other words, he declared the failure to respond to the complaint and discovery was based on his error.

As Cooley notes, however, defendants' application for relief was not "in proper form" because it did not attach a proposed answer. "Because the purpose of the proposed answer requirement is to provide the delinquent party with an opportunity to show good faith and readiness to answer the allegations of the complaint, courts have held substantial compliance to be sufficient." (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 402 (*Tavoussi*).) We cannot say defendants substantially complied with the proposed pleading requirement.

Defendants' counsel did not attach a copy of their proposed answer to his declaration, nor did he declare he had served a copy on Cooley, or that he intended to lodge a copy with the court before or at the hearing. Defendants' opening brief states that their attorney brought a proposed answer to the March 16, 2017 hearing to file if the court granted their application for relief, but this statement is merely argument, not evidence. (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1166, fn. 1.) Nothing in the record supports a finding that defendants' attorney informed the court that he wanted to lodge a copy of defendants' proposed answer in support of their application for relief. Indeed, defendants' attorney declared he did not file a demurrer in response to the complaint based on his error. The declaration does not state defendants would do so if granted relief, however. On this record, we cannot conclude defendants demonstrated to the court their "good faith and readiness to answer" the complaint. (*Tavoussi, supra*, 175 Cal.App.4th at p. 402; see also *County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 838 [describing accompanied pleading requirement as "a screening determination that the relief is not sought simply to delay the proceedings" that is "satisfied by the filing of a proposed answer any time before the hearing"].) The trial court, therefore, was not required to grant defendants' application for relief based on their attorney's declaration of fault because it did not substantially comply with section 473, subdivision (b).

DISPOSITION

The judgment is affirmed. David Cooley is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P.J.

DHANIDINA, J.